IN THE

Supreme Court of the United States

October Term, 1971

No. 71

WILLIAM RABE,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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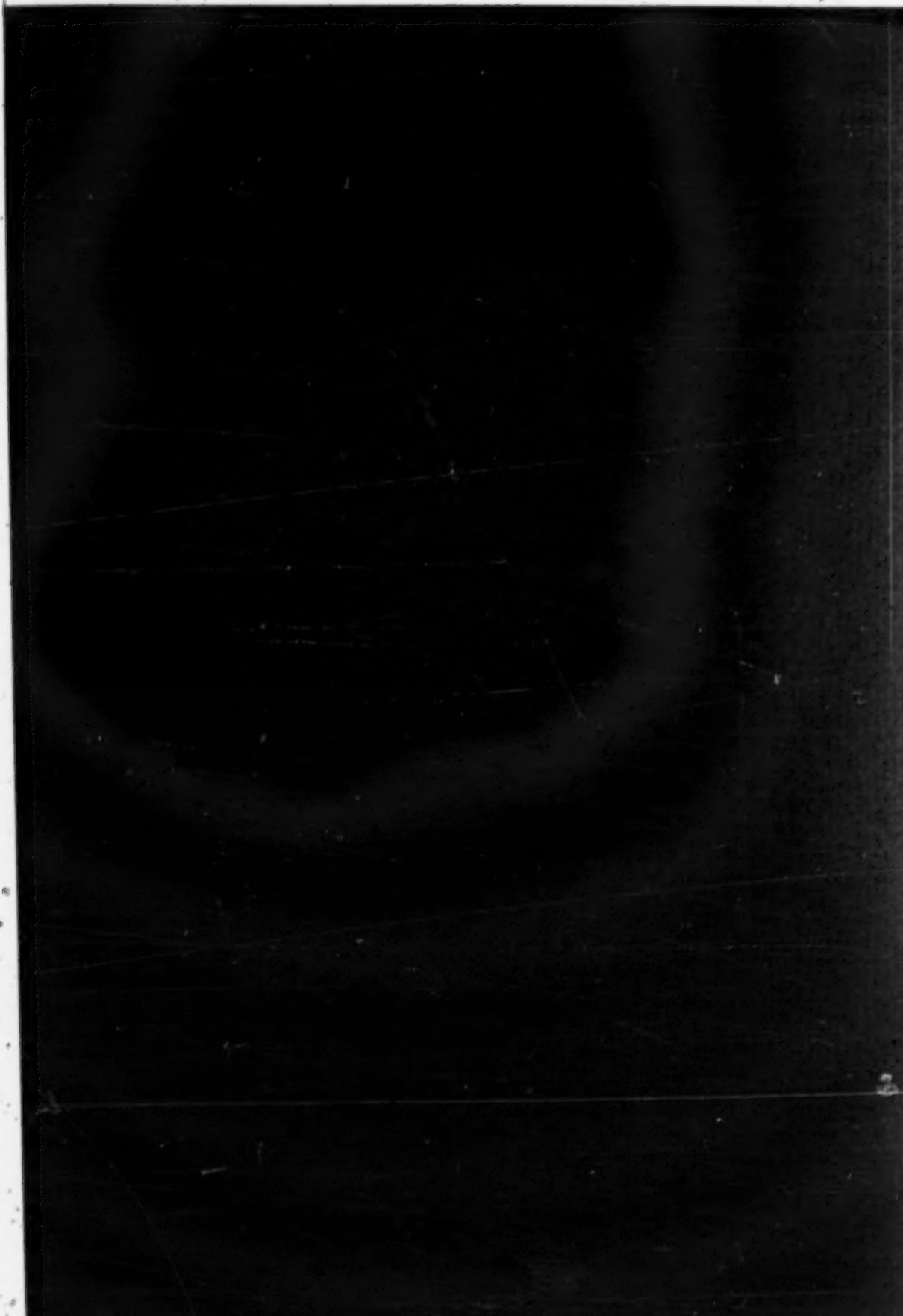

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioner, William Rabe, prays that a writ of certiorari issue to reveiw the judgment of the Supreme Court of the State of Washington entered in this cause on May 6, 1971, and that on hearing the judgment of conviction be reversed.

OPINIONS BELOW

The following opinions and decisions of the courts of the State of Washington are set forth in the Appendix hereto:

1. Opinion of the Supreme Court of the State of Washington, reported at Volume 79, Washington Reports 2nd, page 254, 484 P.2d 917, May 6, 1971 (App. 19-44).

2. Order Denying Motion to Suppress, Justice Court, Richland Precinct, September 27, 1968 (App. 1-4).

3. Decision, Justice Court, Richland Precinct, October 7, 1968 (App. 5-14).

4. Findings of Fact, Conclusions of Law, and Judgment, Superior Court of the State of Washington for Benton County, September 22, 1969 (App. 15-17, 18).

JURISDICTION

The judgment of the Supreme Court of the State of Washington following appeal from petitioner's conviction was entered on May 6, 1971. On July 28, 1971, this Court entered an order extending the time within which to petition for certiorari to and including August 18, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the State of Washington, consistent with the First and Fourteenth Amendments, may convict petitioner, the manager of a drive-in theatre, of criminal violation of a general obscenity statute for exhibiting "Carmen Baby," a motion picture which is not obscene under the standards established by this Court, on the rationale that the picture contains erotic scenes which might be viewed unwittingly and out of context by persons having a view of the screen from nearby houses or passing automobiles.

2. Whether the State of Washington, consistent with the First and Fourteenth Amendments, may convict petitioner of a crime for showing a non-obscene motion picture containing allegedly offensive scenes on a drive-in screen visible from nearby houses and roads, on the rationale of protecting privacy, where the statute relied upon prohibited only the dissemination of obscene materials, the

state had not enacted a statute of the "offensive display" type or any other law giving petitioner notice of the conduct sought to be punished, no one had complained about the film, and there was no evidence that anyone in nearby houses or passing cars had in fact seen it on the screen.

3. Whether the First and Fourteenth Amendments permit the seizure of a motion picture, incident to an exhibitor's arrest on an obscenity charge, where the arrest warrant was issued solely on the testimony of a police officer who had seen most but not all of the film from a distance without hearing any of the sound track, the testimony described individual scenes in the picture, nothing was received in evidence on the film's dialogue or plot, and the magistrate held no adversary hearing on the question of alleged obscenity.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, §1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Laws of the State of Washington, 1961, Ch. 146, § 1, codified as § 9.68.010, page 153, Title A, Revised Code of Washington Annotated:

> 9.68.010 *Obscene literature, shows, etc.* Every person who—
>
> (1) Having knowledge of the contents thereof shall exhibit, sell, distribute, display for sale or distribution, or having knowledge of the contents thereof shall have in his possession with the intent to sell or distribute any book, magazine, pamphlet, comic book, newspaper, writing, photograph, motion picture film, phonograph record, tape or wire recording, picture, drawing, figure, image, or any object or thing which is obscene; or
>
> (2) Having knowledge of the contents thereof shall cause to be performed or exhibited, or shall engage in the performance or exhibition of any show, act, play, dance or motion picture which is obscene;
>
> Shall be guilty of a gross misdemeanor.

STATEMENT OF THE CASE

1. The Motion Picture Involved

This case arises from petitioner's criminal conviction following the showing of a motion picture entitled "Carmen Baby" at a drive-in theatre of which he was manager.

The film is a dramatic story based upon the libretto of the opera "Carmen," which in turn was based upon a novel by Merimee (Tr. 111, 132). It tells of an upright police officer who is corrupted and ultimately destroyed by his physical passion for a prostitute (Tr. 89, 93, 104, 119). The film contains erotic scenes, but sexual consummation is suggested rather than shown (Tr. 88, 122), and the scenes are an integral part of the story and the theme of moral decline and fall (Tr. 89, 108, 115, 120).

Prior to the events here in question, "Carmen Baby" was reviewed in the *New York Times* and was exhibited in various parts of the United States (Tr. 133-34, 76, 84). One witness had seen it playing at Oak Ridge, Tennessee, on an outdoor screen visible from a motel which had arranged to have the sound track of the motion picture piped into the rooms for those who wished to watch it (Tr. 84). In two states, Rhode Island and New Jersey, "Carmen Baby" had been tested in the courts and found to be non-obscene and protected under the free speech guaranty of the First and Fourteenth Amendments. Transcripts of these two unreported state trial court decisions[1] were filed by petitioner in the superior court below, and are reproduced in the Appendix hereto (App. 53, 57). In one of them, Judge Matthews of the New Jersey court gave a concise and engaging summary of the film's contents (App. 71-79), concluding:

> "We have imposed upon us by the Supreme Court of the United States a standard to judge obscenity. I don't have too much difficulty with it. . . .
>
> • • •
>
> "When I look at this film and I look at this test, whether the elements coalesce or not, it seems to me, one, that the dominant theme of this movie taken as a whole is not to a person of average intelligence merely one to appeal to the prurient interest of the members of society. It can. But there are individuals who can get awfully excited at a pencil. There are people who collect shoes, because they get sexual satisfaction from it.
>
> "What we are talking about is the 'normal' member of society.

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1. *Scuncio v. Columbus Theatre, Inc.*, C.A. 67-4565, R.I. Superior Ct.; *Van Curler Broadcasting Corp. v. Musto*, Superior Court of N.J., Hudson County.

"Secondly, is the material patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters? I am sure that no one would go to that picture or no one will learn anything new. There is nothing in that picture that actually portrays the sexual act. You must infer it. The only genitals that are seen are those of a male, and they're on a statue, and you can see those in the Vatican," Judge Drewen.

"And the third test is whether it's utterly without redeeming social value. My reaction to the picture was the utter horror that an individual, a human being, a creature, could have sunk to such baseness without the suggestion that there was something wrong mentally; *and, of course, this was a work of art. It wasn't life. And while it tried to portray life, the way this artist saw life, was through this woman, in this kind of a situation.*

"The picture is not obscene, within the legal sense. . . ." (App. 77-78; emphasis added)

In the State of Washington, the motion picture was exhibited in Seattle, and in a three-week engagement at a drive-in theatre in Yakima (Tr. 76). It was then booked into the Park Y Drive-in Theatre at Richland, another town in Eastern Washington (Tr. 76). Petitioner was the manager of the latter theatre (Tr. 74).

2. Justice Court Proceedings

"Carmen Baby" opened at the theatre in Richland on August 25, 1968. On August 30, 1968, a sergeant of the Richland Police Department signed a criminal complaint and appeared before a justice of the peace seeking a "John Doe warrant" to arrest either the manager or projectionist of the theatre on a charge of showing an obscene film (App. 47). The police sergeant testified that he had seen most of the film on the nights of August 28 and 29, and

described two scenes, one which he characterized as "lewd" and another which he described in answer to the magistrate's inquiry as to whether there were "other scenes of unnatural emotions" (App. 48). He gave no testimony as to the film's thematic content. Indeed, he could not do so, since he had never heard the sound track but only watched the picture from a distance (Tr. 17, 18-19).

The magistrate conducted no adversary hearing and received no other evidence. On the basis of the police sergeant's testimony, he issued a warrant for the arrest of "John Doe" (App. 50). The police then went to the theatre, seized the film, and arrested petitioner (Tr. 15-16).

A trial was held in justice court on the charge that petitioner had violated RCW 9.68.010, the Washington obscenity statute. Before trial, petitioner moved to suppress the film as evidence on the ground that it had been seized in violation of the First and Fourteenth Amendments (App. 51). The justice of the peace denied this motion, rendering a written decision (App. 1). Following trial, the justice of the peace found petitioner guilty on October 7, 1968, and sentenced him to pay a fine (App. 5).

3. Superior Court Proceedings

Petitioner appealed his justice court conviction to the Superior Court for Benton County, the state court of general trial jurisdiction (App. 52). In that court he renewed his motion to suppress, which was again denied (App. 81, 82).

In superior court the case was tried *de novo* commencing April 2, 1969, to the judge sitting without a jury. The

prosecution called six witnesses who rendered opinions on the quality of the film, as follows:

(a) A speech and drama instructor at Columbia Basin College testified that in his opinion the dominant theme of the picture was an appeal to prurient interest, and that it had no redeeming social value, but conceded that he could not say whether it offended contemporary community standards in its portrayal of sex (Tr. 30, 35, 36).

(b) The local vice president of Atlantic-Richfield Company—who, like the other non-experts called by the state answered opinion questions couched in conclusory language by the prosecutor—testified that in his opinion the predominant theme of the film was an appeal to prurient interest, that it was patently offensive in affronting contemporary community standards, and that it had no redeeming social value (Tr. 39-41). Cross-examination revealed that in the preceding two years he had seen only three motion pictures—a Billy Graham film, "The Sound of Music," and "Doctor Zhivago"—and that he had avoided "The Graduate" because in his opinion "it is not good for me, and I guess, therefore, others, to see things like this" (Tr. 42-43).

(c) An insurance agent gave the same conclusory answers to the prosecutor on the three-part obscenity test (Tr. 44-45). But on cross-examination he was unable to give any definition for the word "prurient" (Tr. 46).

(d) The manager of a foods processing plant, a member of the school board, gave the same set of conclusory answers on the obscenity elements (Tr. 49-50). Cross-examination brought out that he was simply equating his personal moral feelings with community standards, and

had testified in terms of the former (Tr. 50-51, 53).

(e) A farmer gave the same set of conclusory answers, but admitted that he was not familiar with current motion pictures, having only seen two in the past five years, and was testifying on the basis of his "personal feeling" (Tr. 56-58).

(f) A psychologist expressed similar conclusions in applying the three-part test for obscenity, although his answer as to community standards was largely unresponsive (Tr. 62-63). He added an opinion that "nudity was underplayed" in the film, which might result in an appeal to "latent homosexuality" (Tr. 63-4). This witness thought that *all* motion pictures are a damaging influence and had seen none in the last five years except some westerns and a James Bond movie (Tr. 66, 69).

Six witnesses testified on petitioner's behalf that the predominant theme of the film was a dramatic story with a moral message (variously interpreted), that it did not offend contemporary community standards, and that it possessed redeeming social value:

(a) A radiological engineer, formerly a professional photographer, chairman of the local Children's Home Society, described other films of equal candor being shown routinely in the vicinity, and praised the photography and theme of "Carmen Baby" (Tr. 84-97).

(b) A woman administrative assistant at the Atomic Energy Commission, chairman of the Library Board for the City of Richland, testified that the picture's theme was "[t]he degradation or almost annihilation of a personality as a result of his obsession for a woman," and that the erotic scenes were necessary to the story (Tr. 103-8).

(c) A mother of four children with a degree in English literature found the "characters interesting" and the opening scene "a beautiful thing" (Tr. 110-115).

(d) A Ph.D in physics saw the film as "a classic tragedy on the Greek model" (Tr. 117-122).

(e) A systems analyst, who sees 75 to 100 motion pictures per year, described this one as "artistic in nature" and as telling "a story that has some value . . ." (Tr. 124-129).

(f) The chairman of the language arts department at Columbia Basin College listed parallels between the film and the opera "Carmen" (Tr. 131-138).

The police sergeant who had signed the criminal complaint testified that the drive-in theatre screen was visible from a nearby highway, and that on both nights that he sat outside the theatre in his car he had seen teenagers and younger children watching the film through a wire fence which surrounded most of the premises (Tr. 17, 20-21).

Petitioner testified that as theatre manager he had been occupied running the concession stand and the ticket office every night, and had never seen the film at the time of his arrest, although he had heard comments about it (Tr. 74-82). This testimony was uncontradicted.

At the close of the evidence and following argument the superior court judge rendered an oral opinion stating, in effect, that he would find petitioner guilty without finding the film to be obscene in the constitutional sense. He stated:

> "The point I am making is that I don't believe that it is necessary for this court to reach the issue of whether the pitcure taken as a whole is obscene. I

think this court under these peculiar circumstnaces must consider each portion of the picture as viewed by, I suppose, all of the families in the residential area, all of the people driving over the overpass, as short scenes, individual portions of the movie, and in looking at it on that basis I agree with Justice Bowman.

"Who can say that this is not obscene? In that light there is no plot, nothing. Just an offensive demonstration displayed to families passing in the night." (App. 86-87)

On April 24, 1969, the judge allowed the prosecution, over petitioner's objection, to reopen to present the testimony of an additional police officer (Tr. 151-53, 155). The officer testified that approximately twelve to fifteen residences in the area have a view of the screen at the drive-in theatre (Tr. 163).

Six months later, on September 22, 1969, the superior court entered its written findings and conclusions, including most significantly Conclusion of Law II:

"Individual portions or scenes of the movie 'Carmen Baby' are obscene and to passing motorists or persons and residents outside the theatre those individual scenes become a movie by themselves." (App. 16)

The court made no findings as to whether petitioner had known the contents of the film, or whether the film as a whole was obscene within the meaning of that term as defined by this Court (App. 15-17). A judgment of "guilty of the crime of obscenity" was entered, and petitioner was sentenced to pay a fine of six hundred dollars (App. 18).

4. State Supreme Court Proceedings

Petitioner appealed his conviction to the Supreme Court of the State of Washington, which received briefs and

heard argument *en banc*. On May 6, 1971, the court filed its opinion affirming the conviction (App. 19-44). Rejecting petitioner's arguments both on the seizure point and on the merits, the court held that the film "probably would pass the definitional obscenity test" of *Roth v. United States*, 354 U.S. 476 (1957), but that the "context of its exhibition" made it obscene in this instance (App. 30-31). While apparently conceding that neither the presence of juveniles outside the fence nor the possible glimpses by passing motorists could support a conviction, the majority concluded that the exhibition of "lewd and offensive films" visible from houses would violate the residents' "individual privacy" contrary to RCW 9.68.010, the obscenity statute (App. 35-37).

Pending the submission of this petition for certiorari, petitioner filed a motion in the state court for a stay of execution of judgment until a ruling from this Court could be obtained. That motion was denied by the Supreme Court of the State of Washington on July 6, 1971. Petitioner thereupon applied to this Court for a stay of execution, which application is still pending at the time this petition is written. The sentence imposed upon petitioner has not yet been executed.

QUESTIONS RAISED BELOW

Part II of the Appendix hereto sets forth excerpts from proceedings in the courts below relating to the time and manner in which the questions here presented were raised, and the state courts' rulings thereon. The following is a summary of those and other relevant parts of the record:

1. Questions One and Two

(a) On September 3, 1968, petitioner entered a plea of

not guilty to the criminal complaint charging him with violating section 9.68.010, Revised Code of Washington (R. 20).

(b) On October 3, 1968, a trial on the merits was held in justice court. On October 7, 1968, the justice court judge entered his written decision finding the film "Carmen Baby" obscene and finding petitioner guilty (App. 4).

(c) On October 9, 1968, petitioner filed a notice of appeal to the Superior Court of the State of Washington for Benton County "from the judgment and sentence herein made and entered in said Justice Court on the 7th day of October, 1968" (App. 52).

(d) Before his trial *de novo* in superior court, petitioner filed with the court the transcripts of the judicial opinions from New Jersey and Rhode Island (App. 53, 57). These transcripts were filed in support of petitioner's contention that, since the film was constitutionally protected, he could not be convicted under the obscenity statute for exhibiting it.

(e) At the outset of petitioner's superior court trial, his counsel urged that under *Jacobellis v. Ohio*, 378 U.S. 184 (1964), the court was obligated under the general obscenity statute to apply a standard applicable to the entire adult population, and that the legislature had not passed a statute applicable to other types of conduct (App. 85).

(f) At the outset of the superior court trial, petitioner's counsel stated that the film could not be held obscene under the standards promulgated by this Court (App. 85).

(g) When the prosecution rested, petitioner moved for dismissal on the ground that there was "no evidence to

sustain the three-cornered burden set forth by the Supreme Court" (App. 86).

(h) After both sides had rested, the superior court judge indicated that he would dispose of petitioner's contentions by declining to reach the question of whether the picture taken as a whole was obscene, and would rule on the basis of short scenes visible to nearby residents and passing motorists (App. 86-7).

(i) In reply, petitioner's counsel argued that such a decision would be "an absolute first across the country"; that such a test would affect "a lot of movies, such as 'The Graduate' "; that the court should rule on the obscenity issue raised by the charge; and that the court was in effect "saying that such a film does not have to be adjudged obscene" (App. 87-88).

(j) Petitioner objected to the proposed reopening of the record to receive testimony on the visibility of the theatre screen from nearby houses (Tr. 152). The court allowed the prosecution to reopen and received the additional testimony (Tr. 155).

(k) Prior to the imposition of sentence, petitioner's counsel argued to the superior court that it had "announced a decision that is a first in the country and it seems to me not fair to penalize Mr. Rabe for not having anticipated that decision" (App. 88).

(l) On September 22, 1969, the superior court entered its findings, conclusions and judgment adjudicating petitioner to be guilty, and, in effect, rejecting his contentions made before and during trial (App. 15-17, 18).

(m) On October 6, 1969, petitioner filed a notice of ap-

peal to the Supreme Court of the State of Washington "from each and every part of the Judgment entered in the [Superior Court for Benton County] on the 19th day of September, 1969 . . ." (App. 89).

(n) In his brief to the Supreme Court of the State of Washington, petitioner assigned as error the superior court's entry of Findings of Fact II, III, and IV, and Conclusions of Law II and III, constituting all of the court's findings on the location and visibility of the screen, the content and quality of the film, the conclusions regarding "individual portions or scenes," and the adjudication of guilt (App. 90-91).

(o) In his brief to the State Supreme Court, petitioner further assigned error to the entry of judgment finding him guilty under the obscenity statute (App. 91).

(p) In his brief to the State Supreme Court, petitioner raised the following points:

(i) there was no evidence of pandering (App. 91);

(ii) the trial court erroneously refused to decide whether the film taken as a whole was obscene, and instead examined each scene independently, "a total departure from the rationale of the cases heretofore decided" (App. 91-92);

(iii) the legislature had not passed any law placing drive-in movies in a separate category, nor any law directed specifically to minors (App. 92);

(iv) the trial court's rationale could be applied to non-obscene books, and film producers and authors would be impossibly handicapped if segments of their work were considered out of context by the courts (App. 92);

(v) the Washington State Legislature had not distinguished between age groups of the population, or between the manners in which a film is exhibited (App. 92);

(vi) if the trial court were upheld most drive-in theatres would be subjected to tests totally dissimilar to those applied to other theatres (App. 92);

(vii) the "isolated parts" test used by the trial court was rejected in *Roth v. United States*, 354 U.S. 476 (App. 92);

(viii) the film "Carmen Baby" is not within the scope of the term "obscenity" as that term has been defined by the courts (App. 93).

(q) The Supreme Court of the State of Washington, by its opinion filed May 6, 1971, affirmed petitioner's conviction and sentence (App. 19-44).

2. Question Three

(a) On September 19, 1968, petitioner filed a motion and supporting brief to suppress the film "Carmen Baby" as evidence on the ground that the warrant under which the film was seized was issued without the procedural safeguards required by the First and Fourteenth Amendments (App. 51).

(b) The motion to suppress was denied by the justice court (App. 1-4).

(c) In superior court petitioner filed a second written motion to suppress on the same grounds (App. 81).

(d) The superior court denied petitioner's motion by oral decision of November 21, 1968 (App. 82-83).

(e) At the start of his superior court trial on April 2, 1969, petitioner renewed his motion to suppress, again urging that the *pre-seizure proceedings* had failed to include a hearing which focused searchingly on the question of obscenity (App. 84-85). The motion was again denied (Tr. 11).

(f) When the film was offered into evidence, petitioner objected on the grounds that the warrant and seizure were unconstitutional (App. 85), and the objection was overruled.

(g) In his brief to the Supreme Court of the State of Washington, petitioner assigned as error the denial of his motion to suppress as evidence the film "Carmen Baby" (App. 90).

(h) In his brief to the state Supreme Court, petitioner raised the following points:

(i) there was no adversary proceeding before the film was seized, nor any hearing which focused searchingly on the question of obscenity (App. 91);

(ii) the police sergeant gave no testimony concerning the film's length or dominant theme, and there was accordingly no basis for the magistrate to find probable cause (App. 91).

(i) The Supreme Court of the State of Washington rejected petitioner's position in its opinion filed May 6, 1971 (App. 19-44).

REASONS FOR GRANTING THE WRIT

This case raises questions of great importance on the interaction between freedom of speech and the right to privacy, and on due process of law in the context of First Amendment rights.

1. Question One

While the Washington Supreme Court has conceded only that "Carmen Baby" "probably" would pass the definitional obscenity test, the record makes unmistakably clear that it would. The film has a predominant dramatic theme,

possesses genuine social value, and is well within the prevailing community standards of candor. Thus it is constitutionally protected under the standards carefully developed in *Roth v. United States*, 354 U.S. 476 (1957), *A Book v. Attorney General of Massachusetts*, 383 U.S. 413 (1966), and other cases.[2]

It is axiomatic that attempts to punish non-obscene materials under general obscenity statutes are unconstitutional under the freedom of speech guaranty of the First and Fourteenth Amendments. E.g., *Jacobellis v. Ohio* 378 U.S. 184 (1964). Here, Washington attempts to escape that principle on the rationale that the film was exhibited in a fashion which invaded privacy. In doing so it relies upon this Court's *per curiam* opinion in *Redrup v. New York*, 386 U.S. 767 (1967), where the Court observed in reversing three convictions:

> "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See Prince v. Massachusetts, 321 U.S. 158; cf. Butler v. Michigan, 352 U.S. 380. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. Breard v. Alexandria, 341 U.S. 622; Public Utilities Comm'n v. Pollak, 343 U.S. 451. And in none was there evidence of the sort of 'pandering'

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2. It is manifest that "Carmen Baby" is superior to much other material within the broad scope of First Amendment protection. *See, e.g.*, the holdings in *Ratner v. California*, 388 U.S. 442 (1967) (per curiam) ("Honey Bee"); *Cobert v. New York*, 388 U.S. 443 (1967) (per curiam) (various films); *Schackman v. California*, 388 U.S. 454 (1967) (per curiam) (various films); *I M. Amusement Corp. v. Ohio*, 389 U.S. 573 (1968) (per curiam) ("Artist's Models"); *Robert-Arthur Management Corp. v. Tennessee*, 389 U.S. 578 (1968) (per curiam) ("Mondo Freudo" and trailer for "Olga's Girls"); *Cain v. Kentucky*, 397 U.S. 319 (1970) (per curiam) ("I, a Woman"); *Bloss v. Michigan*, 29 L.Ed.2d 106 (May 3, 1971) ("A Woman's Urge").

which the Court found significant in Ginzburg v. United States, 383 U.S. 463." *Id.*, 386 U.S. at 769.

The Washington court has construed the foregoing language to mean that an *obscenity* statute—not a privacy-protection statute—can be wielded to punish the exhibition of non-obscene materials where supposed privacy interests are at stake. Such an application of the law would seriously inhibit expression and invest prosecuting authorities with unbridled discretion to punish speech.

A question of prime importance is thus raised as to the *means* a State may use to suppress speech for the sake of privacy: Did *Redrup* authorize the use of general obscenity statutes to punish supposed invasions of privacy by the display of *non-obscene* materials, absent a statute expressly drawn for that purpose?

The answer must be negative if First Amendment freedom in this context is to be preserved. Even if a State may regulate the content of public displays visible to an unwilling audience of passersby, surely it may do so only by the enactment of a specific statute narrowly drawn to deal with the matter sought to be proscribed. It has long been the rule that First Amendment rights may not be restricted by a statute, general and indefinite in its terms, which leaves a wide area of discretion to enforcement authorities. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). In those cases where this Court has sanctioned limitations upon First Amendment rights on the basis of asserted invasions of privacy, it has done so only in the context of approving narrowly drawn statutes or ordinances designed to protect the asserted privacy interests. See *Breard v. City of Alexandria*, 341 U.S. 622 (1951), cited by the Court on the privacy point in *Redrup* (ordinance regulating the solicitation

of homeowners as to commercial materials); *Rowan v. United States*, 397 U.S. 728 (1970) (federal statute allowing recipient of certain types of material in the mail to have his name removed from mailing lists); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (ordinance prohibiting the use of sound trucks which emit loud and raucous noises).[3] Washington, however, has passed no statute at all directed to the supposed harms described by its Supreme Court as justifying petitioner's conviction.

The standard set forth in *Roth* was carefully and precisely formulated; the Court recognized that only in this way can the obscenity standard have ascertainable meaning. *Roth v. United States*, 354 U.S. 476, 491 (1957). The Washington Court, however, has jettisoned this established meaning of obscenity and substituted one which is vague, overbroad and, indeed, incomprehensible.

The *Roth* standard requires that each motion picture be judged as a whole; a film cannot be suppressed merely because certain scenes are thought objectionable. *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Trans-Lux Distributing Corp. v. Regents of the University of New York*, 380 U.S. 259 (1965) (per curiam). The newly announced Washington standard for outdoor screens would test each individual "scene" for thematic content, offensiveness and redeeming social value (App. 28).

3. *Public Utils. Comm'n v. Pollak*, 343 U.S. 451 (1952), also cited by the court in *Redrup*, was a civil action, not involving a statute, in which the court held that a regulatory commission's order authorizing piped-in music in District of Columbia street cars did not violate the passengers' First Amendment rights. *Close v. Lederle*, 424 F.2d 988 (1st Cir.), *cert denied*, 400 U.S. 903 (1970), relied upon by the Washington Supreme Court, was also a civil action, involving a university's right to regulate the contents of art displays on the corridor walls of the institution.

But what is a "scene"? Would a single image flashed on the screen for a few seconds constitute a "scene" for purposes of invoking criminal liability? In numerous films on Biblical themes, or on the nature of contemporary life, or on many other subjects, one could single out a small part and declare it, wrenched from its context, to have a predominantly prurient appeal and to be devoid of redeeming social value. Should all such pictures be barred from the outdoor screens? If so, would that not eliminate from this important medium of communication all films having any erotic content whatever? If not, how could the exhibitor rationally decide which pictures to exclude? The concept of an individual "scene" being "obscene" even though the film is not would afford him no guidance, for it defies comprehension—and the predictable result would be that timidity and over-caution which so effectively chill expression.

The record shows that the screens of many if not most drive-in theatres are visible from points outside their enclosures (Tr. 149). Thus the decision below, unless reversed, will seriously abridge the First Amendment rights of many outdoor film exhibitors, and, necessarily, of innumerable members of their audiences.

The impossibility of applying the obscenity concept to isolated parts of a protected work is shown by the Washington court's conclusion, near the end of its opinion, that "lewd and offensive films" are barred where privacy is involved (App. 36).

This lapse into vagueness reveals that the court's trans-

formation of the obscenity statute would deprive the law of its ascertainable, constitutional meaning and engraft upon it a second standard of unconstitutional breadth and obscurity. The phrase "lewd and offensive," adopted as the end product of the court's reasoning, is the very type of vague, overbroad language which has been repeatedly stricken down where First Amendment rights are at stake.[4]

Thus, by adopting a vague, fragmented-parts obscenity test for films shown on drive-in screens, the State has violated the rule that a statute containing indefinite standards for the restriction of speech is invalid under the due process clause. The public must be fairly apprised of what is forbidden. In *Winters v. New York*, 333 U.S. 507 (1948), the Court said: "There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment." *Id.* at 515. And it is no answer that the meaning of a speech-restricting statute could be filled in by judicial construction; such content cannot constitutionally be supplied by a series of criminal

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4. E.g., *Holmby Prod., Inc. v. Vaughn*, 350 U.S. 870 (1955) (not "of a moral, educational or amusing character"); *Gelling v. Texas*, 343 U.S. 960 (1952) ("cruel, obscene, indecent and immoral, or tend to debase or corrupt morals . . ."); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) ("sacreligious"); *Trans-Lux Distributing Corp. v. Maryland State Bd. of Censors*, 240 Md. 98, 213 A.2d 235 (1965) and *Dunn v. Maryland State Board of Censors*, 240 Md. 249, 213 A.2d (1965) ("dominant purpose or effect is erotic or pornographic, or if it portrays acts of sexual immorality, lust or lewdness, or if it expressly or implicitly presents such acts as desirable, acceptable or proper patterns of behavior"); *Kingsley Corp. v. Regents*, 360 U.S. 684 (1959), ("acts of sexual immorality . . . as desirable, acceptable, or proper patterns of behavior"); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968) "sexual promiscuity . . . in such a manner as to be, in the judgment of the court, likely to incite or encourage delinquency or sexual promiscuity . . . etc.").

prosecutions. *Dombrowski v. Pfister*, 380 U.S. 479, 490-491 (1965).[5]

2. Question Two

Significant issues of First Amendment due process, apart from the issue of vagueness discussed above, are raised by Washington's judicial extension of its obscenity statute to punish the exhibition of a non-obscene film on grounds of invasion of privacy.

The State has not enacted a statute of the "offensive display" type, although other jurisdictions have done so.[6] Nor, as the court itself points out, had Washington even recognized a common law right of privacy until the day of the instant decision (App. 36).

The statute invoked against petitioner, RCW 9.68.010—passed in its present form in 1961, following the *Roth* de-

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5. Similar issues to those presented by Washington's use of its obscenity statute to punish conduct not specified therein are raised by the use of general nuisance laws to suppress speech. The Third Circuit has recently stricken down the attempted use of public nuisance law to enjoin exhibition of a film on the ground that such use of nuisance laws violated the constitutional rule that speech may not be punished under a statute which fails to define precisely the offense charged. The Court held that while the law of nuisance is appropriate in some contexts, it "may not be used . . . both to define the standards of protected speech and to serve as the vehicle of its restraint." *Grove Press v. City of Philadelphia*, 418 F.2d 82, 88 (Cir., 1969).

The nuisance issue is before the Court in the coming term in *Mitchum v. Foster*, No. 876, probable jurisdiction noted, 29 L.Ed.2d 109 (May 3, 1971).

6. *E.g.*, New York Senate Bill No. 5609, approved on June 25, 1971, prohibiting the public display of materials depicting nudity, and other defined materials, "in such manner that the display is easily visible from or in any public street. . ."; and Arizona House Bill 301, approved May 10, 1971, prohibiting the public display of certain defined "explicit sexual material" in locations "easily visible from a public thoroughfare, from the property of others, or from commercial or business premises generally open to minors at the time of such placing."

cision—necessarily carried to petitioner and others a specific meaning: that criminal sanctions could follow from the dissemination, with knowledge of its contents, of a motion picture which was obscene when taken as a whole within the meaning of *Roth* and subsequent decisions.

The statute said nothing about proscribing individual scenes, and nothing about anyone's right to privacy.

The State's judicial pronouncements, moreover, had supported the protection of motion pictures under the freedom of speech guaranty, excepting those which were obscene. *Fine Arts Guild, Inc. v. Seattle,* 445 P.2d 602 (Wash. 1968).

Thus nothing in the statute or elsewhere gave petitioner notice that he could be prosecuted for exhibiting a non-obscene film at a drive-in the screen of which was visible from afar. Closely in point is the Court's recent reversal of a speech-punishment conviction in *Cohen v. California,* 29 L.Ed.2d 284 (1971):

> "In the first place, Cohen was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested *must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places." Id.* at 29 L.Ed.2d 290; emphasis added.

Cohen thus preserves, while the decision here below would forfeit, the basic due process rights of fair notice and hearing on a specified charge enunciated in *Cole v. Arkansas,* 333 U.S. 196 (1948). As the Court held in *Bouie*

v. Columbia, 378 U.S. 347 (1964):

> "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language *but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language*. As the Court recognized in *Pierce v. United States*, 314 U.S. 306, 311, "judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." *Id.* at 352; emphasis added.

Moreover, Washington has undertaken this remarkable *ex post facto* extension of its obscenity statute on the basis of a factual record which falls far short of showing the "assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it" mentioned in *Redrup, supra*, 386 U.S. at 769.

The court's opinion eliminates the presence of juveniles voluntarily watching the film through the fence as a basis for affirmance, on the ground that the state had not yet passed a statute specifically directed to juveniles.[7] (App. 37). (It is not explained why the absence of a statute should not be equally fatal to the invasion-of-privacy argument.) The opinion also appears to eliminate the privacy of passing motorists as a ground of decision, since they would obtain only short glimpses of the screen (App. 35). Thus the decision rests solely upon the supposed privacy interests of householders having the screen in sight (App. 35-36).

Yet the occupants of houses in the vicinity would obviously have but a silent view of a distant screen, and would

7. It has since done so, RCW 9.68.060.

watch the images thereon, beyond an occasional glimpse, only to the extent that they chose to do so. Totally absent here is the kind of inescapable intrusion involved in such cases as *Breard v. City of Alexandria* and *Kovacs v. Cooper, supra.* And paradoxically, under the court's "individual scenes" concept of obscenity, the householder who took time to watch the *entire film* through his window would presumably restore the work to constitutional protection.

Here, the record shows no complaints about the film from householders or anyone else. There is no evidence that anyone from a nearby house even saw any part of the picture. Petitioner's conviction thus rests upon the assumption that someone in a neighboring house *might* have seen the film, and *might* have felt his privacy invaded by it. But here, as in *Cohen v. California, supra,*

> . . . the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. *Id.*, 29 L.Ed.2d at 291.

The foregoing infirmity in the opinion below is recognized by Justices Finley and Neill, who concur in the result.[8] They conclude that the majority's rationale is in error because:

> "Decisions of the federal courts in the area here involved seem to me to indicate that the First Amendment rights cannot be circumscribed absent clear proof of an *actual assault* upon the rights of a nonconsenting individual." (App. 43; emphasis in original)

8. The concurrence is on the ground of alleged "pandering" within the meaning of *Ginzburg v. United States,* 383 U.S. 463 (1966). That view, not shared by the majority below, is insupportable because (a) the film does not present a "close case" as to obscenity, and (b) there is no evidence whatever of record concerning its advertising or promotion.

To uphold the majority's judicial extension of a narrowly drawn statute would effectively subject speech to the chilling prospect of regulation unpredictable in both time and extent.

3. Question Three

The Washington Supreme Court held that the *ex parte* hearing which the justice of the peace conducted prior to issuing an arrest warrant satisfied the requirements established by this Court for the seizure of allegedly obscene materials. That hearing consisted entirely of testimony by one police officer who had never seen the entire motion picture and who was unable to testify regarding the thematic content of the film because he viewed it from outside the theatre grounds and did not hear the sound track. The officer's testimony accordingly was limited to a verbal description of isolated scenes (App. 47-48).

The justice of the peace issued the warrant solely upon the basis of this testimony; he did not view the film himself. In fact, the magistrate failed even to issue a *search* warrant which described in detail the film to be seized, as required by the Fourth Amendment, *Marron v. U.S.*, 275 U.S. 192 (1927). Rather, he merely issued a warrant for the arrest of "John Doe," and left it to the officers to carry it out and to seize the film in the process.

In *Marcus v. Property Search Warrant*, 367 U.S. 717 (1961), this Court held that the First and Fourteenth Amendments require that a magistrate utilize a "procedure . . . designed to focus searchingly on the question of obscenity" before he issues a warrant for the seizure of allegedly obscene publications. Three years later the Court held that the requirement of a searching inquiry into the

question of obscenity can be fulfilled only by affording an opportunity for a pre-seizure adversary hearing. *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964). The same standard of a searching inquiry has been held applicable in the case of an evidentiary seizure of a motion picture film, although the Court has not yet been required to decide whether the standard invariably calls for a pre-seizure adversary hearing in such cases. *Lee Art Theatre v. Virginia*, 392 U.S. 636 (1968).

The constitutional requirement of a *searching* inquiry can be satisfied only in the context of a contested, adversary hearing. The absence of anything resembling such inquiry here is striking evidence that only an adversary process can ensure that the attention of the magistrate will be directed to the relevant legal principles, and that he will not issue a warrant without consideration of its impact upon protected First Amendment rights.

Even by *ex parte* standards, the procedure followed here was deficient. At the very least, a hearing cannot constitute a "searching inquiry" unless testimony is received from one who has seen, and heard, the entire motion picture, or unless the magistrate himself views the film before issuing the warrant. *Marcus v. Property Search Warrant*, 367 U.S. 717, 731-32 (1961).

The Washington Supreme Court held that *Marcus* and *A Quantity of Books* require a pre-seizure adversary hearing only when, as in those cases, a warrant is sought for the seizure of large numbers of publications in the course of civil proceedings looking toward their destruction. The Court reasoned that the seizure of "Carmen Baby" for use as evidence in petitioner's criminal prosecution involved

only a "temporary" restraint of a single motion picture film and that the length and scope of the restraint imposed by the seizure, and the danger that nonobscene items would be seized, were therefore considerably less than in *Marcus* and *A Quantity of Books*. The Court did, however, note that state and federal appellate decisions are in direct conflict on this question. Several state courts have reached the same conclusion as the Washington Court. *Bloss v. Michigan*, 171 N.W.2d 455 (Mich.App. 1969), reversed on other grounds, 29 L.Ed.2d 106 (1971); *Commonwealth v. State Amusement Corp.*, 248 N.E.2d 497 (Mass. 1969); *People v. DeRenzy*, 79 Cal.Rptr. 777 (Cal.App. 1969); *Monica Theater v. Municipal Court*, 88 Cal.Rptr. 71 (Cal. App. 1970). On the other hand, federal circuit courts have held that an adversary hearing is required before evidentiary seizure of a film can be made. *Demich, Inc. v. Ferdon*, 426 F.2d 643 (9th Cir. 1970), reversed on other grounds, 28 L.Ed.2d 528 (1971); *Astro Cinema Corp. v. Mackell*, 422 F.2d 293 (2nd Cir. 1970); *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639 (4th Cir. 1969); *Metzger v. Pearcy*, 393 F.2d 202 (7th Cir. 1970).

The Washington court has vastly underestimated the extent to which the arrest of a film exhibitor and evidentiary seizure of his film can restrain the exercise of First Amendment rights. Characterization of such a seizure as "temporary" ignores the fact that criminal prosecutions may involve restraints on dissemination for periods of time substantially beyond the maximum period of restraint considered constitutionally permissible in other contexts. *United States v. Thirty-Seven Photographs*, 28 L.Ed.2d 831 (1971).

For example, here more than six months elapsed between the seizure and petitioner's trial *de novo* in Superior Court, and more than a year between the seizure and the trial court's entry of findings and judgment. During all of that time the film was impounded and its exhibition prevented —a far longer period than the seventy-four day maximum set by the Court in *Thirty-Seven Photographs, supra* (Tr. 10). Yet the superior court, and later the Washington Supreme Court, held in effect that "Carmen Baby" *was* capable of lawful dissemination to the public (for example, in an indoor theatre or an outdoor theatre enclosed by an opaque fence). Thus the lack of any adequate pre-seizure hearing effectivly contributed to the suppression of a non-obscene film for a period of a year at the trial court level—precisely the danger which caused this Court to require a pre-seizure adversary hearing in *A Quantity of Books v. Kansas*, 378 U.S. 205, 211 (1964).

Furthermore, it is incorrect to assume, as the Washington court has done, that the scope of the suppression is small when only a single copy of a film is seized. A film such as "Carmen Baby" which is held for public exhibition, unlike a single book, is directed at all those who would be in the audience—not at a single purchaser. "Preventing this number of persons from viewing a film is certainly equivalent to seizing all copies of a book from the newsdealers involved in *A Quantity of Books. . . .*" *Astro Cinema Corp. v. Mackell*, 422 F.2d 293, 295 (2d Cir. 1970).

Even assuming that the exhibitor could obtain another film print—which is unlikely in a small city such as Richland, Washington—the fact of his previous arrest would certainly deter him, and other exhibitors in the area, from obtaining and showing another print until the final judicial

determination of its protected character. Arrest and seizure therefore equal complete suppression. "Functionally an arrest resembles a non-judicially imposed injunction against certain conduct. . . ." H. Monaghan, *First Amendment Due Process,* 83 Harv.L.Rev. 518 (1970).

Seizure without an adversary hearing—particularly when a film admittedly suitable for dissemination to adults is effectively censored in toto for months on end—is a classic example of the kind of excessive regulatory technique which was emphatically rejected in *Butler v. Michigan,* 352 U.S. 380 (1957). A ruling by this Court on the point would be of major constitutional importance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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